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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 21, 2004

Case No.: TIA-0278

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that one illness was related to work at the DOE and the remaining illnesses were not. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a

physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant filed a Subpart B application with DOL for prostate cancer. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction.

The Applicant filed a Subpart D application with OWA, claiming lichens planus, prostate cancer, skin cancer, lung nodules, hepatitis, and enlarged thyroid. The OWA referred the claims to the Physician Panel. The Physician Panel issued a positive determination on the lichens planus and negative determinations on the remaining illnesses. The OWA accepted the positive and negative determinations, and the Applicant filed an appeal.

In his appeal, the Applicant challenges the determinations on prostate cancer, skin cancer, and enlarged thyroid. The Panel states that he does not believe that the Panel took full account of his radiation exposure. He also objects to the Panel's statement that the record lacks evidence of an enlarged thyroid.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that the Panel did not take full account of this radiation exposure does not indicate Panel error. The Applicant does not elaborate on this argument, and it appears to be a disagreement with the Panel's medical judgment that his radiation exposure was not a significant factor in any of his illnesses. If the Application receives a NIOSH dose reconstruction that he believes supports his position, he should raise the matter with DOL.

The Applicant's objection to the Panel's statement that the record lacks evidence of an enlarged thyroid does not indicate OWA or Panel error. The case history contains a notation indicating that the Applicant told OWA he had no records on that illness. Record at 18. If the Applicant wishes to have records on that illness considered, he should ask the DOL how to proceed.

As the foregoing indicates, the Applicant has not demonstrated Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0278, be, and hereby is, denied.

(2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 3, 2005